

Chapter VII— *Justice On The Right To Light And Air*

Mr. Spencer's carelessness of thought is shown in the very opening sentence of this chapter on "The Rights to the Uses of Natural Media":

A man may be entirely uninjured in body by the actions of fellow-men, and he may be entirely unimpeded in his movements by them, and he may yet be prevented from carrying on the activities needful for maintenance of life, by traversing his relations to the physical environment on which his life depends.

How?

To ordinary apprehension, the only way in which men can be deprived of the use of "the physical environment on which life depends" is either by such bodily injuries as killing, maiming, binding, imprisoning, or by such restrictions on movement as have the threat of bodily injury behind them, like the taboo among the South Sea Islanders, or private property in land among us. Nor have the tyrants of the world, much as they would have liked to, ever been able to find any other way.

Without condescending to explain, Mr. Spencer goes on to quote Erskine to the effect that "the light, the air, running water, etc., are so adapted to the common use of mankind, that no individual can acquire a property in them, or deprive others of their use."

This again shows carelessness in apprehension and statement. What Erskine really means is that the law does not, and that because it cannot, give property in the substance of matter, so that the molecules or atoms of which it is composed may be identified and reclaimed through all changes in form or place; but that ownership can attach to matter only in its relation to form or place. For instance, I buy today a dog or a horse. I acquire in this purchase the ownership of what matter is now, or at any time in the future may be, contained in the form of this dog or horse, not the ownership of a certain amount of matter in whatever form it may hereafter assume. That no law could give me, nor could I even set up a claim to it, for it would be impossible for me to identify it. For the matter which my dog or horse embodies for the moment, like the matter of which my own frame is composed, is constantly passing from that form to other

forms. The only thing tangible to me or other men is this form. And it is in this that ownership consists. If my dog eats your mutton-chop, your property in the chop does not become property in the dog. If the law gives you any action it is certainly not that of replevin.

The principle of the law that Erskine refers to is thus stated by Blackstone (Chapter 2, Book II):

I cannot bring an action to recover possession of a pool or other piece of water either by superficial measure for twenty acres of water or by general description, as for a pond or a rivulet; but I must bring my action for what lies at the bottom and call it twenty acres of land covered with water. For water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property; wherefore if a body of water runs out of my pond into another man's I have no right to reclaim it. But the land which that water covers is permanent, fixed and immovable, and therefore in this I may have a certain substantial property, of which the law will take notice and not of the other.

Now the comparatively rough distinctions that are amply sufficient for the purposes of the lawyer are not always sufficient for the purposes of the philosopher. If we analyze this principle of the law, we see that no real distinction is made as to ownership between the substance of water and the substance of land—that is to say, between the more or less stable forms of matter of which the body of the universe consists. The distinction is as to tangible form. I may bring an action for ice, which is water that has assumed tangible form by the lowering of temperature, or for water in barrels or bottles, which in another way gives it form. And the real reason why, in an action for the possession of a body of water I must describe it as land covered by water, is that it is the land which holds the water in place and gives it form.

So, on the other hand, if a freshet or a water-burst carry the fertile soil from my field into that of my neighbour, I can no more reclaim it by action at law than I can reclaim the water that runs out of my pond. Or if a volcanic convulsion were to shift the position of a mineral deposit, it would cease to belong to one landowner and the other would acquire legal possession. The legal result would be precisely the same as the legal result of a change in a rivulet's course. In ruder times, ere the art of surveying was so well developed as now, it was customary to fix the boundaries of legal possession by natural objects

deemed immovable, such as mountains, ocean shores, rivers, etc., and in places where this method has been retained changes in landmarks frequently change the ownership of considerable bodies of land, as on the shifting banks of the lower Mississippi. But our modern surveying takes for its basis latitude and longitude. And this is the essential idea of landownership: It is the ownership, not of certain atoms of matter, be they rock, soil, water or air, or of certain forms of energy, such as heat, light or electricity, but the ownership of a certain section of space and of all that may be therein contained.

Mr. Spencer is confusing two essentially different ideas—the idea of substance and the idea of form or locality. In the one sense nothing whatever may be owned—land no more than light or electricity. In the other, all natural substances and powers may be owned—water, air, light, heat or electricity, as truly as land. And they are owned, though, since in our legal terminology space and its contents are known as land, they must in law be described as land. Whoever, under our laws, acquires ownership in land may deprive others of light, air, running water, etc., and does acquire a property in their use, which is frequently a tangible element, and at times the only element in the value of an estate—as where the purity of the air, the beauty of the view, the abundance of sunlight which a favourable exposure gives, the presence of mineral springs, or the access to streams, are elements in the price at which land can be sold or rented.

In the next sentence we are told that "light and air cannot be monopolized." But they are monopolized in the monopolization of land, and this as effectually as any monopolizer could wish. It is true that air and sunlight are not formally bought, sold and rented. But why? Not that they could not be measured off and determined by metes and bounds, but simply because they are to our physical constitutions inseparable from land, so that whoever owns the land owns also the air it is bathed in and the light that falls on it. Light and air are monopolized whenever land is monopolized; and the exclusive use to them is bought and sold whenever land is bought and sold.

It is not merely that, as the flying-machine has not yet been perfected, the owner of land holds the means of access to the air above it and the light that falls on it; it is that the owner of land is the owner of such light and air, not merely virtually, but formally and legally. And were the air-ship perfected, he would have the same legal right

to forbid trespass on his light and air, and to demand payment for any use made of it or any passage through it, thousands of feet above the surface, as he now has to forbid trespass on his ground or to demand payment for any use of or any passage through what lies thousands of feet below it. In English law, land does not mean merely the surface of the earth within certain metes and bounds, but all that may be above and all that may be below that surface; and under the same legal right by which the landowner holds as his private property any certain part of the surface of the globe he also holds the rocks and minerals below it and the air and the light above it. As Blackstone says: "The word 'land' includes not only the face of the earth, but everything under it or over it. ... By the name of land everything terrestrial will pass." The landowner is, in law as well as in fact, not a mere surface-owner, but a universe-owner. And just as in some places landowners sell the surface right, retaining mineral rights; or sell mineral rights, retaining surface rights; or sell the right of way, retaining rights to other use: so, where there is occasion, the right to use light and air may be separated, in sales and purchases and title-deeds, from the right to the use of the ground.

An invention which would make practicable the use of light and air without possession of the surface, would at once bring out the fact that, legally, they belong to landowners, just as subterranean mining and the projection of underground railways have brought out the fact that landowners are legal owners of all beneath the surface. In fact, existing deeds furnish instances in which the real thing bought and sold, though properly enough styled land in the conveyances, is not land at all in the narrow meaning, but light and air, or the right to their use. To cite a case: The city of Cleveland, O., some years since, desired to convert the viaduct bridge over the Cuyahoga River into a swinging bridge. To do this it was necessary that one end of the bridge should in its swing pass for a short distance through the air over a strip of land belonging to a private owner. The city of Cleveland had, therefore, to buy the right to use this air, and I have before me a copy of the deed, executed on the 28th of February, 1880, by which, in consideration of \$9994.88, Meyers, Rouse & Co. sell and convey to the city of Cleveland the right to swing such bridge over a small area thirty-five feet above the ground. Of this estate in the air the grantors describe themselves as holding a good and indefeasible

title in fee simple, with the right to bargain and sell the same. Were it thirty-five hundred or thirty-five hundred thousand feet above the surface, the legal right of ownership would be the same. For the ownership which attaches to land under our laws is not to be really measured by linear feet and inches, but by parallels of latitude and meridians of longitude, starting from the centre of the earth and indefinitely extendible. And while Meyers, Rouse & Co. have sold to the city of Cleveland a slice of their air of perhaps fifteen feet in depth, they still retain the legal ownership of all the air above it, and could demand toll of or refuse passage to any flying-machine that should attempt to cross it.

The same lack of analytic power continues to be shown by Mr. Spencer when he goes on to tell us that the equal rights to the use of light and air, though not recognized in primitive stages, have, in the course of social evolution, come to be completely or all but completely recognized now. So far is this from being true, that in such countries as England and the United States there is no recognition whatever of the equal right to the use of light and air. To the list of interdictions which he cites as recognitions of this equal right, he might as well have added that of shying bricks through these media at passers-by. For where the interdictions he mentions—of interceptions of light and air, of smoking in certain places, of the maintenance of stenches and fumes, of the making of disturbing noises—are not mere interdictions of certain species of assault; they are interdictions based on and involved in the ownership of land.

Mr. Spencer might have seen this for himself, where he speaks of "the law which forbids the building of walls, houses, or other edifices within prescribed distances of other houses ... and seeks to compromise the claims of adjacent owners as fairly as seem practicable."

Owners of what? Why, owners of land. It is only as an owner of land, or as the tenant of an owner of land, that under our English law any one has a right to complain of the interception of light and air by another landowner. The owner of land may intercept light and air, may make noises and create stenches to any extent he pleases, provided he infringes not the equal rights of other owners of land, for light and air are considered by English law as what they truly are, so far as human beings are concerned, appurtenances of land. No one in England, be he stranger or native-born, has any legal right whatever

to the use of English light and English air, save as the owner or grantee of an owner of English land. That even on the Queen's highways the public are deemed to have such rights as against adjacent landholders I am not sure. Certain it is, that one may travel for miles through the public roads, amid the finest scenery in those countries, and find the view wantonly shut out by high and costly walls, erected for the express purpose of intercepting the light, and crowned on their tops with broken glass, to tear the clothes and cut the flesh of any one who dares climb them to get such a view as the unintercepted light would give.

The rights to the use of light, air and other natural media are in truth as inseparable from the right to the use of land as the bottom of that atmospheric ocean which surrounds our globe is inseparable from the globe's surface; and the pretence of treating them separately could spring only from Mr. Spencer's evident desire to confuse the subject he is pretending to treat, to cover with a fog of words his abandonment of a position incapable of refutation, and from the false assumption that the liberty of each to the use of air and light, limited only by the like liberty of all, is practically and legally recognized, to lead to the still more preposterously false assumption that equal rights to the use of land are also fully recognized.

But before examining this last assumption, there is one form of it which he incidentally makes that is worth noticing—the assumption that the equal right to personal liberty and freedom of movement is already fully recognized.

It is a pity that Mr. Spencer had not intermitted his studies of the Abors, the Bodas, the Creeks, the Dhimals, the Eghas, and other queer people, to the end of the alphabet, of whom his later books are as full as those of the pedants of the last century were of classical quotations, and made some observations in his own country. They would have saved him from the astounding statement that—

At the present time, among ourselves at least, there exists no idea, sentiment, or usage, at variance with the conclusion that each man is free to use his limbs and move about where he pleases.

The truth is, that instead of every one being free in England "to use his limbs and move about where he pleases," there is no part of the British Isles, even though it be wild moor, bleak deer-forest or bare mountain-top, where a man is free to move about without per-

mission of the private owner, except it be the highroads, the public places, or other strips and spots of land deemed the property of the community.

Mr. Spencer seems to have forgotten this now, but he knew it when in *Social Statics* he denounced the system that permitted the Duke of Leeds to warn off tourists from Ben Mac Dhui, the Duke of Atholl to close Glen Tilt, the Duke of Buccleuch to deny Free Church sites, and the Duke of Sutherland to displace Highlanders with deer.

"Verily, they have their reward." The name of Herbert Spencer now appears with those of about all the Dukes in the Kingdom as the director of an association formed for the purpose of defending private property in land that was especially active in the recent London County Council election.